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 PROCUREMENT APPEALS

DATE: Nw-16, 2018

TIME: 3:02  AM  PM BY: Chris

FILE NO OPA-PA: 18-002

**THE OFFICE OF PUBLIC ACCOUNTABILITY  
 HAGÁTÑA, GUAM**

In the Appeal of:	)	DOCKET NO. OPA-PA-18-002
	)	
<b>KORANDO CORPORATION,</b>	)	
	)	<b>DEPARTMENT OF PUBLIC WORKS'S</b>
Appellant.	)	<b>AMENDED HEARING BRIEF</b>

**I. INTRODUCTION**

This is an appeal by **Korando Corporation** (“**Korando**”) of the **Department of Public Works** (“**DPW**”) November 15, 2017, determination of eligible costs under the parties December 16, 2015 Stipulation and Order (“**Stipulation and Order**”), and the parties March 25, 2014, contract for construction of the Bile/Pigua Bridges Replacement (Project No. GU-NH-NBIS(007) (“**Korando’s Contract**”). *See, Stipulation and Order and Korando’s Contract, See, Korando’s Hearing Ex. No. 1 and 5*, attached hereto respectively.

Pursuant to Korando’s Contract Section I(a), Korando was to complete the Bile/Pigua Bridges Replacement Project No. GU-NH-NBIS(007) (the “**Project**”) within four hundred and fifty (450) days from DPW’s issuance of a Notice to Proceed, which DPW issued on November 19, 2015. *Id.* After commencement of the Project, delays occurred on the Project primarily related to

**ORIGINAL**

Korando's failure to prosecute work on the Project. By a letter dated July 10, 2015, DPW terminated Korando for cause. At the time of termination Korando had completed less than one per cent (1%) of the permanent work and it was estimated that it would exceed the completion date by more than one hundred and thirty-two (132) days. *Id.*

Korando appealed its termination to the **Office of Public Accountability** ("OPA"). The formal hearing on Korando's appeal commenced on December 9, 2015, and after four (4) days of formal hearing, the parties reached agreement under which DPW would rescind the July 10, 2015 Termination Letter in accordance with the parties Stipulation and Order and Korando's Contract. The Stipulation and Order provides in relevant part as follows:

5. Upon signing of this Stipulation Korando can submit written Proposed Change Orders in accordance with the terms and conditions of Korando's Contract. DPW agrees that it will review on the merits and process the Change Orders timely and in good faith, and in accordance with Korando's Contract. Korando's change orders will include, but are not limited to, the following:

- a. Demobilization and remobilization costs, materials previously ordered or in store, which cannot be used on the Project due to the delay of the Project, and other expenses related to the termination and delay of the Project.

\* \* \* \* \*

*See, Korando's Hearing Ex. No. 5.*

On October 17, 2017, Korando submitted to DPW a second corrected claim ("Korando's Second Corrected Claim"). Korando's Second Corrected Claim claimed costs related to the termination and delays on the Project of Four Hundred Ninety-Nine Thousand, Two Hundred Twenty Nine Dollars & 66/100 (\$499,229.66), with an additional Two Hundred Two Thousand, Nine Hundred Eighty Nine Dollars & 17/100 (\$202,989.17) in surety expenses. *See, Korando's Hearing Ex. No. 11.* Korando's Second Corrected Claim totaled Seven Hundred One Thousand, Two Hundred Eighteen Dollars & 83/100 (\$701,218.83), or over Twenty Per Cent (20%) less than Korando's First Corrected Claim. *Id.* On November 15, 2017, less than thirty (30) days receipt of Korando's Second Corrected Claim, DPW responded in a timely manner advising that based on the review of all information provided to date and through review of Project records, "DPW has determined \$29,241.46 is eligible for reimbursement pursuant to the Stipulation and Order ..."

*See, Korando's Hearing Ex. No. 11*, attached hereto. Nonetheless, as of the date of DPW's 11/15/2017 Determination Letter, Korando had failed or otherwise refused to provide a number of backup or supporting documentation (e.g., Lizama's Equipment Rental, Korando's Boom Truck, Pineda Survey, etc.) needed by DPW to properly review Korando's Second Corrected Claim. *Id.*

On January 18, 2018 Korando appealed DPW's 11-15-17 Determination Letter to the OPA alleging, among other items, that it is entitled to a modification of the parties Contract and a Change Order. *See, Korando Hearing Ex. No. 20.*

## **II. ISSUES ON APPEAL**

- A. Whether DPW, based on the documentation provided by contractor, properly calculated the sums due Korando under Korando Contract, and the Stipulation and Order?**
  
- B. Whether the vast majority of Korando's claims should be dismissed because the terms of the December 16, 2015 Stipulation and Order to Rescind Termination are too vague and ambiguous to be enforceable?**

## **III. DISCUSSION**

- A. DPW acted in good faith in reviewing Korando's Claims and properly calculated the sums due Korando.**

DPW responded to Korando's three (3) claims in a timely manner, particularly when considering Korando's own delays in submitting its Initial Claim and other Bile/Pigua documents.

On October 18, 2016, over ten (10) months after the parties signed the Stipulation and Order, Korando submitted its Claim Due to Termination and Delay of Project. *See, Korando's Hearing Ex. No. 9.* Korando's Initial Claim claimed Eight Hundred Eighty-Three Thousand, Six Hundred Ninety-Six Dollars & 63/100 (\$883,696.63) for the "cost of mobilization, demobilization and any other expenses related to the termination and delay of the Project." Although Korando took over ten (10) months to prepare Korando's Initial Claim it failed to provide backup documents and explanations needed for DPW to properly complete its review.

DPW responded in a timely manner on December 28, 2016, requesting backup documents and/or clarification for certain claimed items needed to complete its review. *See, DPW's 12/28/16*

*Response*, attached hereto as, *See, Korando's Hearing Ex. No. 9*. Korando responded to DPW's December 28, 2016 request via a January 24, 2017 letter in which it submitted the following:

Exhibit 1 - Corrected Claim Amount

Exhibit 2 – 1. Mobilization and Demobilization

Exhibit 3 – 2. Field Office

Exhibit 4 – 4. Staging Area

Korando's Corrected Claim provided some but not all of the backup documents and explanations needed by DPW to complete its review. DPW nonetheless proceeded in reviewing Korando's claim. *See, Korando's Corrected Claim*, attached hereto with Exhibit 1, as *See, Korando's Hearing Ex. No. 10*. Korando's Corrected Claim increased its claim to Eight Hundred Eighty-Five Thousand Six Hundred Eleven Dollars & 69/100 (\$885,611.69). *Id.*

DPW evaluated Korando's three (3) claims in good faith under the terms of Korando's Contract and the Stipulation and Order. In this respect DPW's consultants, **Parsons Transportation Group ("PTG")** and the **Federal Highway Administration ("FHWA")**, the letter of which funded the Project, had preliminary discussions to review technical aspects of Korando's claims. Subsequently, DPW, the FHWA and PTG reviewed a number of revisions to DPW's draft determination letter. *See, Korando's Hearing Ex. No. 9*. The purpose of the meetings and other communications was for DPW and FHWA to provide PTG with instructions on how the various claim items should be addressed in the written response to Korando. PTG prepared a preliminary draft response on or about April 13, 2017. *See, Korando's Hearing Ex. No. 20*.

Upon completion of DPW's draft April 13, 2017 response to Korando, it was forwarded to DPW's legal counsel for review and comment. At that time DPW's counsel, Assistant Attorney General Thomas P. Keeler, advised the department that he believed that DPW was obligated to reimburse the Surety's (i.e., Weschester Fire Insurance Company) costs. *See, Korando's Hearing Ex. No. 42* (Email dated 5/11/17 from T. Keeler to DPW parties). Based on counsel's input DPW engaged in additional discussions and analysis.

Subsequent to these discussions, DPW in consultation with PTG and the FHWA determined in good faith that Surety's costs were not covered by the Stipulation and Order dated 12/16/15.

DPW's 11/15/17 Determination Letter was finalized within thirty (30) days of Korando's Second Revised Claim and is the culmination of DPW, FHWA and PTAG's draft responses, calls, and meetings and represents the department's good faith effort to evaluate Korando's Second Corrected Claim based on the documentation Korando provided in support of its claim.

Korando must be deemed to have waived any objections as to the timeliness and good faith of DPW's Determination Letter as it took over ten (10) months to file Korando's Initial Claim.

Further, how can Korando possibly represent that it is acting in good faith in submitting an initial Claim totaling nearly Nine Hundred Thousand Dollars (\$900,000) on a Project that it had worked on over seven (7) months and yet had only completed one per cent (1%) of the work at the time of termination?

In addition, Korando failed to avail itself of its administrative remedies. Under 5 G.C.A. §5427 (Authority to Resolve Contract and Breach of Contract Controversies), Subsection (f) provides as follows:

(f) Failure to Render Timely Decision. If the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or the designee of one of these officers does not issue the written decision required under Subsection C of this Section within sixty (60) days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

*See also, Korando Contract, Special Contract Requirements, Modification to FP-03 § 103.02.*

The Stipulation and Order, as part of the parties resolution of outstanding disputes and desire to recommence work on the Project, did not access fault to either party. Under Section's 1 – 4 of the Stipulation and Order the parties agreed as follows:

- DPW agreed to rescind the July 10, 2015 termination of Korando
- Korando agreed to complete the Project in accordance with the June 10, 2014, Contract, as revised by the Stipulation and Order.
- A new start date of January 25, 2016 was agreed to, with Korando having the full 450 days as provided in the Contract in which to complete the Project.
- DPW waived all liquidated damages through the new start date.

- DPW would process Korando's first and second Payment Applications totaling \$317,615.79.

In essence the parties agreed to walk away from the OPA Appeal, for DPW to rescind the Termination of Korando and for Korando to recommence the Project under the *same terms and conditions as contained in Korando's Contract*, except as revised or clarified by the Stipulation and Order. In this respect, the Stipulation and Order did not adversely impact Korando's duration of performance or the Project's completion date. Instead the parties agreed to a new start and completion dates. As a new completion date was agreed to, the Project's critical path started anew. Thus, there doesn't exist any reasonable relationship to the assessment of delay damages under Korando's three (3) claims.

Further, if Korando's claim is based on an "agreement" under the Stipulation and Order as alleged, how or why was its Second Corrected Claim reduced by over twenty percent (20%)?

Under the Stipulation and Order of December 16, 2015, Korando also claims that DPW breached the Contract. Specifically, Korando claimed questioned the adequacy of the bridges loading capacity for the project work. Accordingly, Korando had Mr. J.M. Aquino perform a structural assessment of the existing bridges superstructures. Mr. Aquino reported the Bile and Pigua existing bridge superstructures are structurally inadequate and failed to meet AASHTO LRFD requirements. Mr. Aquino's assessment, Project Submittal 562.006-02, was submitted on June 4, 2015. DPW responded in a timely manner on June 15, 2015, with comments and questions based on the assumptions contained in the report. As Mr. Aquino and Korando failed to revise and resubmit the assessment report it is effectively barred from challenging the structural integrity of the bridges. Korando proceeded with the temporary bridge design without conclusively showing the bridges were structurally inadequate. *See*, DPW's Amended List of Exhibits, **Ex. J**, (Jeff Miller's - Bile/Pigua Bridges Replacement). Korando was repeatedly instructed that a formal written request was required to initiate a Change Order in the scope of work. *See*, for example, DPW's Amended List of Exhibits, **Ex. K**.

In closing, DPW acted in good faith in reviewing Korando's Initial, First and Second Corrected Claims. Korando's January 18, 2018 Appeal is without merit. Accordingly, the Public Auditor should *deny* Korando's Appeal.

**B. The language Korando inserted in the Stipulation and Order dated 12/16/15 is so vague and indefinite as to place DPW on notice of Korando's claim and as such is unenforceable.**

Generally, in construing contracts Courts not only look to the language of the instrument, but must ascertain, if possible, the intention of the parties, and the construction which is fair and reasonable will prevail. *Couch v. Couch*, 35 Tenn. App. 464, 248 S.W.2d 327; *Commerce Street Co., Inc. v. Goodyear Tire & Rubber Co., Inc.*, 31 Tenn. App. 314, 215 S.W. 2d 4. And where several instruments are made as part of one transaction, they will be read together and each will be construed with reference to the other. *Great American Indemnity Co. v. Utility contractors, Inc.*, 21 S.W.2d 901; 17 C.J.S., Contracts, § 298, p. 714.

Despite the plain wording of the Stipulation and Order tying Proposed Change Orders to the terms and conditions of Korando's Contract, Korando's Second Corrected Claim asserts damages totaling Seven Hundred One Thousand and Two Hundred Eighteen Dollars & 83/100 (\$701,218.83). It is axiomatic that if Korando intended the Stipulation and Order's phrase "and other expenses related to the termination and delay" to ipso facto justify Seven Hundred One Thousand and Two Hundred Eighteen Dollars & 83/100 (\$701,218.83) in damages, that it was incumbent upon it to state such in simple and straightforward words.

While the Stipulation and Order was jointly presented to the OPA, the language in question (i.e., "and other expenses related to the termination and delay"), was offered by Korando. The plain meaning rule states that all language used in contracts should be a simple and transparent as possible while still managing to convey the terms of the contract. It is intended to reduce ambiguous language as much as possible. When reading a contract, the meaning of the words used should seek to avoid overly obscure definitions. "The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles." *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S. W.2d 578, 580 (Tenn. 1975).

If a contract contains ambiguous terms, however, they are strictly construed against the party who drafted the contract. This rule of strict construction is often applied in contracts containing exculpatory clauses, or provisions that attempt to insulate a party, usually the party who drafted the contract, from liability. Thus, when a clause in a contract between a health club and a member, in which the member waived her right to bring legal action for injuries she suffered at the health club, was held to be ambiguous, it was construed strictly against the health club and it was found to be invalid (*Nimis v. St. Paul Turners*, 521 N.W.2d 54 [Minn. App. 1994]). The language used by Korando in the Stipulation and Order is ambiguous at best. It uses words that are neither defined nor contained in Korando's Contract. It is abundantly clear from DPW's Determination Letter that the vast majority of the \$701,218.83 in alleged damages claimed by Korando were not contemplated as eligible costs at the time of signing the Stipulation and Order. Simply stated, if Korando wanted these costs to be reimbursable it should have stated such in plain and simple terms.

A valid contract requires that the parties objectively manifest to all material terms of the agreement. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wash. 2d 171, 177-78, 94 P.3d 945 (2004). Whether mutual assent exists is usually a question of fact. *Id.* At 178 n. 10, 94 P.3d 945. In the rather famous case of *Hadley v Baxendale* (1854) 9 Ex 341, 156 Eng Rep 145, the Court explains:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

The underlying principle of foreseeability seeks to fairly allocate risks between parties. If the breaching party could not have reasonably foreseen the damages caused by the breach of the contract, then the risks could not have been initially allocated between the parties to the contract fairly.



In closing, the language used by Korando in the Stipulation and Order was so vague and ambiguous that no contract was formed with DPW for the vast majority of Korando's Second Corrected Claim. Korando should be reimbursed for the sum of \$29,241.46 only.

### **C. IMPROPRIETIES IN KORANDO'S LIST OF ISSUES FILED APRIL 9, 2018**

Korando misstates the facts in its sixth (6<sup>th</sup>) List of Issues filed with the OPA on April 9, 2018, to which DPW objects:

**A. Korando's Issue #6 Misstates the Law.** Korando's Appeal did not include a claim that DPW violated the Open Government Law as set forth in 5 GCA § 8101 *et. seq.*, in connection with its review of Korando's Initial Claim, Corrected Claim and Second Corrected Claim. First, Korando filed a breach of contract appeal. Korando's Appeal is not a procurement appeal.

The law cited by Korando relates to "a collective decision made by a majority of the members, in a properly notice meeting of a governing body, of a public agency, ..." *See*, 5 GCA § 8104 (a). The law under which DPW operates on this matter is 5 GCA § 10108 (a), which allows DPW to withhold documents pertaining to pending litigation "until the pending litigation has been finally adjudicated or otherwise settled." *See also*, Estate of Jose Martinez Torres v. Office of the Attorney General, Superior Court of Guam Civil Case No. CV1132-15 (Disisyon yann Otden, April 16, 2018). To argue that an agency is required to disclose discussions, memorandums and documents related to a department's analysis of a claim against the government, as Korando does, is without merit and contrary to Guam law.

Korando also claimed that the Record on Appeal was not produced in a timely manner. DPW subsequently supplemented the record a number of times. In particular, PTG's internal emails, PTG's Supplemental Materials and PTG's Mike Lanning's personal supplemental documents are now all on file with the OPA. *See, Purchasing Agency's Amended Exhibit List*, Exhibit's E, F and G. Further, DPW's February 12, 2018, filing with the OPA contained 5 separate draft responses to Korando's Claims, copies of which are attached hereto as, *See*, DPW's Amended List of Exhibit, **Ex. J**. It is DPW's position that any concerns with the department's filing of the procurement record were resolved by the parties May 30, 2018 Stipulation and Order re Motion to Compel.

In conclusion, Korando's Appeal should be denied in its entirety, except for statutory interest due on the sum of \$29,241.46 as provided for herein.


**RELIEF REQUESTED BY DPW**

DPW respectfully requests a ruling from the OPA as follows:

1. DPW acted in good faith in reviewing Korando's initial and (2) corrected Change Orders.
2. Korando's language inserted in the Stipulation and Order was so vague and ambiguous that it failed to place DPW on notice of the nature and extent of its claim.
3. Korando is entitled to reimbursement in the amount of \$29,241.46.
4. Such other relief that the Office of Public Accountability deems proper.

Dated this 16<sup>th</sup> day of November, 2018.

OFFICE OF THE ATTORNEY GENERAL  
**Elizabeth Barrett-Anderson**, Attorney General



By:

For

**THOMAS P. KEELER**  
Assistant Attorney General